

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 184/2016

In the matter between:

WILBARD SHAANIKA

PLAINTIFF

and

ELINA NANDIGOLO NDEUFEWA SHAANIKA

DEFENDANT

Neutral citation: *Shaanika v Shaanika* (I 184/2016) [2016] NAHCNLD 103 (05 December 2016).

Coram: CHEDA J

Heard: 12.09.2016 & 26.09.2016

Delivered: 05 December 2016

Flynote: **Ethics** - A judicial officer, Arbitrator or Mediator should not preside over a matter where his/her son or a family member is a legal practitioner for the other party as this will be viewed as bringing bias and impartiality into the hearing by right-thinking members of society. The fact that the parties have agreed does not exempt him/her.

Summary: This matter was referred for mediation and the two legal practitioners agreed that the presiding mediator whose son is one of the legal practitioners for the one party preside over meditation proceedings. The parties seem to have consented. In the interest of justice and ethics this was not proper as the perception of bias and impartiality on the part of the mediator is glaring. The mediator is prevented from presiding over any matter where his son is acting for one of the parties.

ORDER

1. Mr. Greyling (Senior) must not preside over matters where his son(s) is representing the other party in the court-connected mediation;
2. Mr. Greyling (Junior) must not appear in a court-connected mediation where his father is presiding as a mediator;
3. The Registrar's Office is ordered not to allocate matters to Mr. Greyling (Senior) where Mr. Greyling (Junior) is representing one of the parties;
4. The Alternative Dispute Resolution Office must appoint a different mediator; and
5. There shall be no order as to costs.

JUDGMENT

CHEDA J:

[1] The parties are in legal and holy matrimony in terms of the Namibia laws and the said marriage still subsists.

[2] Plaintiff issued summons out of this court which was defended. The proceedings progressed in the usual manner and the matter was referred to a court-connected mediation. Inonge Mainga Attorney are the legal practitioners for plaintiff

while Jan Greyling (Junior) acted for defendant. The merits of the case are not part of this judgment as they are yet to be determined by a court-connected mediator.

[3] The mediator who was allocated this matter by the Registrar's Office (Alternative Dispute Resolution Office) is Mr. Jan Greyling (Senior). Mr. Greyling (Senior) who until December 2015 was the sole partner of Jan Greyling & Associates and Mr. Jan Greyling (Junior) was a profession assistant in the said law firm. At the beginning of 2016, Mr. Greyling (Senior) retired and the law firm was dissolved and now practices under the name and style of Greyling and Associates of which three brothers are partners including Jan Greyling (Junior). In this jurisdiction there are accredited mediators, a pool from which the Registrar, (Alternative Dispute Resolution Office) chooses from. There are six accredited mediators including Mr. Greyling (Senior) in the Northern Local Division of the High Court.

[4] On two occasions Mr. Jan Greyling (Senior) with the concurrence of Jan Greyling (Junior) has been allocated cases where his son is representing one of the parties. On those two occasions, I raised a query as to the propriety of this practice and I invited Mr. Greyling (Junior) together the legal practitioners from the opposite side into my chambers and registered my displeasure about such conduct. On those two occasions he agreed with me and other mediators that other mediators should handle such matters.

[5] Despite all this Mr. Greyling (Junior) has again with the concurrence of the Assistant Registrar in charge of the Alternative Dispute Resolution Office allocated a matter to Mr. Greyling (Senior) where Mr. Greyling (Junior) is representing one of the parties. What has prompted this judgment is that in the present matter Jan Greyling (junior) has argued in an open court to the effect that his father is an independent person and the parties have agreed that he so presides. It is his view that, there is no prejudice to any party and further that there is no provision in the rules precluding his father from presiding on such matters where he as a legal practitioner is representing another party.

[6] I was not satisfied with this argument and I invited both legal practitioners to file heads of argument so that I can make an informed decision as to what the

correct legal position is as it is apparent that this issue will be forever re-surfacing before this court.

[7] Mr. Greyling (Junior) filed substantial heads of argument which are indeed well researched. His argument is:

- a) that it was plaintiff's legal practitioner who proposed Jan Greyling (Senior) for his experience and that in her opinion he would assist the parties to search for a speedy resolution; and
- b) therefore, that the parties had no objection in Jan Greyling (Senior) hearing the matter.

[8] Mr. Greyling (Junior) argued that mediation is a voluntary process whereby parties lay down their disputes before an independent third party chosen by them or appointed for them. He went further and argued that mediation is a private process in which an impartial person, a mediator encourages and facilitates communication between the parties. This indeed was a good argument and infact it is well stated.

[9] He went out of his way to lay down the duties and expectations of a mediator. In that regard he referred me to the following authorities:

- a) Dispute Resolution, Paul Pretorius, 2009 p41;
- b) Texas Ethical Guidelines for Mediators;
- c) New Zealand Law Society, Guidelines for Mediators; and
- d) Law Council of Australia's Ethical Guidelines for Mediators

[10] All these are guidelines have one common thread that runs through them which can be sammed up as follows, that a mediator:

- a) must be neutral;
- b) must disclose any information that may compromise his impartially;
- c) facilitate communication between the parties;
- d) must be impartial; and
- e) must be independent.

[11] Mr. Greyling (Junior) cannot have been more correct in that regard. He made further reference to Rule 38 (1) (a) of the High Court Rules which empowers the Managing Judge to refer a case to Alternative Dispute Resolution which matter should be conducted by a court-connected mediator. The said Rule reads:

“38 (1) The managing judge may, at any time in terms of practice directions issued by the Judge-President, either of his or her own initiative or at the request of a party refer any part of the proceeding or any issue to an alternative dispute resolution (ADR) process or in an attempt to resolve that part of the proceeding or issue by way of alternative dispute resolution and towards that end the managing judge must, after hearing the parties -

- (a) give directions concerning terms of reference, where and how, and if not agreed by the parties, by whom such ADR is to be conducted; and
- (b) stipulate the time when it is to be conducted, as well as the time when or within which a report by the conciliator or mediator concerned is to be submitted to court.

(2) ...

(3) ...

(4) ...

(5) The managing judge is not obliged to follow the recommendation or conclusion of the conciliator or mediator and he or she may make any order as he or she considers appropriate.”

[12] It was further his submission that where the parties have no objections to the appointment of a mediator, the managing Judge has no authority to query it. This spirited argument goes to show how determined he was to see his father presiding over his matters. I shall come to this point later.

[13] Ms. Shailemo for plaintiff also filed her heads of argument. The thrust of her argument is that, she sees nothing untoward in Mr. Greyling’s (Senior) presiding over cases where his son is a representative of a litigant as long as the parties have

agreed. She further argued that there is no reasonable apprehension of bias on behalf of the plaintiff. Further, it was her view that Mr. Greyling (Senior) will conduct himself in a manner that does not rise to a conflict. Above all, that, he will bring a wealth of experience to the mediation.

[14] Before I discuss the points raised in this matter I should make it clear that it is the Alternative Dispute Resolution Office that appointed Mr. Greyling (Senior) to preside over a matter where his son is representing one of the parties. In *casu*, both legal practitioners raised no objection to such appointment as is required by the rules.

[15] The overriding objective of the introduction of case management is found in Rule 1 (3) and it is therefore a guiding principle as to what the case management should achieve, the said rule reads:

“1 (3) The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by -

(a) ensuring that the parties are on an equal footing;

(b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter;

(c) ...

(d) ensuring that cases are dealt with expeditiously and fairly;

(e...

(f) ...” (emphasis added)

[16] Mr. Greyling (senior) is indeed a senior legal practitioner, to my knowledge is full of experience, and nothing has bloated his name so far. The question that falls for determination is whether in light of the circumstances and position he finds himself in presiding over disputes where his son is representing the other party can reasonably be viewed as without bias or be deemed impartial. This is the issue this court is enjoined to interrogate.

[17] What should be understood right from the start is that these courts are the foundation of justice and which is embedded in fairness. Those are the two most important features of a judiciary process. The introduction of mediation in the dispute resolution is in my view an extension of the judiciary process whose most important features includes the requirement for fairness and whose Siamese twin is the principle of impartiality.

[18] Even though this is a statutory requirement, the principle is founded on common law which embraces the rules of natural justice. The mediator is by extension an officer of the court and is expected to perform his duties without bias and therefore should be impartial.

[19] The position of an arbitrator of which the mediator acts as one, is in material respect the same as that pertaining to a judiciary officer, see, *Sasol Infrachem v Sefafe and Others* (JA 58/12) [2014] ZALAC 54; [2015] 2 BLLR 115 (LAC); (2015) 36 ILJ 655 (LAC) (21 October 2014) para 44 where Coppin J remarked:

“the position pertaining to an arbitrator would in material respects be the same as that pertaining to a judicial officer, save that in the case of judicial officers there is a presumption of judicial independence.”

[20] In the same case the court went further and reasserted the test for bias where it stated at paragraph 48.

“The test for bias is settled and it is whether a reasonable, objective and informed person would, on the correct facts reasonably apprehend bias.”

It referred to the same test that was formulated in *Bernet v Absa Bank Ltd* 2011 (3) SA 92 (CC)

[21] What should be determined is whether the mediator may be viewed as partial or biased in his deliberations where his son is a legal practitioner for one of the parties. The enquiry is an objective one as it examines whether a reasonable and informed person would on the correct facts reasonably apprehend that the presiding officer has not or will not bring an impartial mind to bear on the determination of the case before him; that is a mind open to persuasion by the evidence and the submissions of counsel, see, *Kwazulu Transport (Pty) Ltd v Mnguni & Others* (95/2000) [2001] ZPLC 57 (19 April 2001).

[22] Ms. Shailemo submitted that since Mr. Greyling (Senior) is an experienced legal practitioner he is worthy of trust. While this is correct, this does not, in my view, make him the only experienced mediator as the first batch of mediators were trained and accredited at the same time with other mediators in the North. That, therefore, does not make him a unique mediator as he ranks the same with others. There are 5 others mediators who have been so trained and have so far properly conducted mediations with equal professionalism and efficiency.

[23] Therefore, it is not correct to place him on a higher pedestal than others in the circumstances.

[24] In this matter, the court is faced with a question of the existence or otherwise of bias. The test for bias is an objective one; it is whether there would be a real likelihood of bias. Clearly, put, the question is, would right – minded persons think that there was bias on the part of the presiding officer, if the answer is in the affirmative, then, the presiding officer should not sit on that case. There must be circumstances in which a reasonable man would think it likely or probable that justice would favour one side unfairly. The applicable principle were clearly and well set out by Lord Denning, MR in the matter of *Metropolitan Properties Co (FGC) Ltd v Lannon and Others* [1968] 3 ALLER 304 (CA) at 309 I – 310 D wherein he stated:

“In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. ..., nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think that he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: ‘the judge was biased’.” (my emphasis)

[25] Both legal practitioners argued that Rule 38 (1) (a) empowers the Judge to only give directions with regard to who **may** mediate in a dispute. They based their arguments on the use of the word “may” and not “shall” for that reason, it is their, view, that the non-use of the word shall, being peremptory, the court should not intervene.

[26] While this indeed is in some circumstances a good academic argument the point which seems to have eluded them is that the court has a common law power to intervene where justice and fairness is being compromised. The court cannot standby when it realises that the justice system is being compromised. The court does not operate in a vacuum, but, within a live environment and must be seen to have a human face and has a duty to protect the image and dignity of the legal system.

[27] I now turn to the circumstances of the two Greylings. They are blood relatives as Mr. Greyling (Senior), the mediator is the father while Greyling (Junior) is the son. His son is compromised in the whole process as it is unreasonable to expect him to

forcefully and effectively argue a case before his own father. This situation is undesirable and would place both of them in difficulties.

[28] The common adage that, “blood is thicker than water” fits this scenario very well. In that regard even the father is naturally bound to tread softly on his son. This is only natural. While this is happening, litigants will suffer. The common English proverb that “he whose father is Judge, goes safe to his trial” cannot have been more appropriate in this regard. This proverb illustrates the subjectivity of a human mind.

[29] Mr. Greyling (Junior) is likely to gain advantage over other legal practitioner as a result of a perception that his father acts favourably to him. This may not be so, subjectively viewed, but, this being an objective view it is bound to shake the confidence of people of the justice delivery system. It is the public’s perception which is the determining factor in this matter. The court has a duty to promote and protect good legal and moral conduct at all times.

[30] A trier of facts, mediators included, must not put their impartiality into question. The following factors should be taken into consideration:

- a) whether the lawyer relative who is representing a litigant before the mediator will receive a remuneration from the case, if he will then the mediator (father) finds himself in the mould of pecuniary interest;
- b) The degree of kinship between the mediator and the legal practitioner. In this case, there is the father-son relationship. The father being in a position of authority by both being a father and mediator will be indeed over-bearing;
- c) If the mediator knows that his lawyer relative has given legal advice to the matter in dispute, again the issue of pecuniary interest sets in;
- d) The prominence of the mediator name in the firm where the relative lawyer practices (Greyling & Associates);
- e) Whether the mediator by virtue of a court order is obliged to carry out the order as he becomes the court’s extension and is, therefore, expected to adjudicate in accordance with principles of fairness and impartiality of the said court.

[31] A mediator, who by virtue of his positions is empowered to direct proceedings must not preside over a matter where his relative has a pecuniary interest. In *casu* Mr. Greyling's (Senior) relationship is sufficiently close to warrant a reasonable inference that his impartiality is likely to be compromised.

[32] As pointed out earlier on, Mr. Greyling (Junior) has on three occasions insisted that his father should preside over his cases. The reason advanced is that the Rules do not prevent it. With greatest respect, the Rules seek objectivity, fairness and justice to the parties. I am at a loss as to why he should insist on his father to preside over his clients' matters when there is a pool of other properly trained and competent mediators in this division.

[33] The fact that the parties' legal practitioners agreed that Mr. Greyling (Senior) be appointed as mediator and therefore the courts should not interfere is a fallacy as the court cannot rubber stamp decisions which offend even the basic sense of fairness impartiality and justice. The court will be failing in its duty if it does not guard against such practice. In the Metropolitan Case; Bernet v ABSA Bank Ltd (Oct 37/2010 [2010] ZACC 28 19/12/2010 and President of the Republic of South Africa and Others v South Africa Bugby Football Union & Others [1999] ZACC 9 (4) SA 147 the test for bias was expressly dealt with and applied. This has been our approach in this jurisdiction and it has stood the test of time.

[34] The enquiry is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the mediator or adjudicator will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and submissions of counsel.

[35] In *casu*, I am of the considered view that, the case before me fails that test. It is, therefore, undesirable for Mr. Greyling (Senior) to preside over a matter where his son appears for one of the parties.

[36] I, am therefore, of the view that the obtaining practice of appointing Mr. Greyling (Senior) as a mediator where his son is a legal practitioner for one of the

parties should never be allowed as it goes against the ethos of impartiality and will in the eyes of right-thinking persons be viewed as biased. Such practice will tarnish the image of the court, legal profession, the legal practitioners involved and the mediator himself. Above all the court has an inherent duty to protect those who are uninformed about the tenets of justice.

[37] In light of the above the following is the order:

1. Mr. Greyling (Senior) must not preside over matters where his son(s) is representing the other party in the court-connected mediation;
2. Mr. Greyling (Junior) must not appear in a court-connected mediation where his father is presiding as a mediator;
3. The Registrar's Office is ordered not to allocate matters to Mr. Greyling (Senior) where Mr. Greyling (Junior) is representing one of the parties;
4. The Alternative Dispute Resolution Office must appoint a different mediator; and
5. There shall be no order as to costs.

M Cheda
Judge

APPEARANCES

APPLICANT : T Shilemo
Of Inonge Mainga Attorneys, Ongwediva

RESPONDENT: J. Greyling (Jnr)
Of Greyling & Associates, Oshakati